(1) 95-997

Supreme Court, U.S.
FILED
DEC 22 1995
CLERK

No. 95-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LEWIS J. MERTZ,

Petitioner,

v.

THE CITY OF KEY WEST,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

ROBERT E. WEISBERG
KAREN D. TURNER
LAW OFFICES OF
ROBERT E. WEISBERG
1450 Madruga Avenue
Suite #209
Coral Gables, Florida 33146
(305) 666-6095

DAVID M. LIPMAN
(Counsel of Record)
DAVID M. LIPMAN, P.A.
5901 S.W. 74TH Street
Suite #304
Miami, Florida 33143
(305) 662 2600

Attorneys for Petitioner

43 pp

QUESTION PRESENTED

1. If a public employee with a state-created property interest in continued employment is terminated by the governing body of the political entity that employed him, in a situation in which it was feasible to hold a pre-termination hearing, and the employee in fact received no pre-termination notice or hearing, does the employee state a claim under the procedural component of the Due Process Clause of the Fourteenth Amendment, notwithstanding the availability of a constitutionally adequate post-deprivation remedy in state court?

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed appear in the caption of the case.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL PROVISION INVOLVED 2

STATEMENT OF CASE 3
A. Statement of Facts 3
B. Disposition in the Courts Below 7

REASONS FOR GRANTING THE WRIT 10

CONCLUSION 21

APPENDICES:

APPENDIX A

Opinion of the United States District Court for the Eleventh Circuit (August 23, 1995) 1a

TABLE OF CONTENTS - Continued

APPENDIX B

Summary Final Judgment of the United States District Court for the Southern District of Florida (December 21, 1994) 3a

APPENDIX C

Final Order Granting Summary Judgment of the United States District Court for the Southern District of Florida (November 16, 1994) 5a

TABLE OF AUTHORITIES

CASES Page

Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623 (7th Cir. 1995) 15, 19

Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532 (1985) 14, 15, 17, 18, 19

Cotnoir v. Univ. of Maine Systems, 35 F.3d 6 (1st Cir. 1994) 13, 19

Fetner v. City of Roanoke, 813 F.2d 1183 (11th Cir. 1987) 13, 14, 18

Fuentes v. Shevin, 407 U.S. 67 (1972) 18

McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. den., __ U.S. __, 115 S.Ct. 898 (1995) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 20

Parratt v. Taylor, 451 U.S. 527 (1981) 12, 15, 16, 17

Patsy v. Board of Regents, 457 U.S. 496 (1982) 13, 15

Schultz v. Baumgart, 738 F.2d 231 (7th Cir. 1984) 13, 19, 20

TABLE OF AUTHORITIES - Continued

Zinermon v. Burch, 494 U.S. 113 (1990)
. . . . . 15, 16, 17, 18

CONSTITUTION, STATUTES, AND RULES

U.S. Const. amendment XIV... . . . . 2, 10

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 7

42 U.S.C. §1983 . . 7, 9, 10, 11, 13, 14, 18, 20

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1995

LEWIS J. MERTZ,

Petitioner,

v.

THE CITY OF KEY WEST,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

Petitioner Lewis J. Mertz respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit in Lewis J. Mertz v. City of Key West, Florida, Case No. 94-5268, D.C. Docket No. 93-10072 CIV-JLK.

OPINIONS BELOW

The per curium panel opinion of the United States Court of Appeals for the Eleventh Circuit affirming the District Court's grant of summary judgment in favor of the City of Key West, Florida, is unreported, and is reproduced in Appendix A (1a-2a). The United States District Court for the Southern District of Florida's Summary Final Judgment entering summary final judgment in favor of Defendant, City of Key West, Florida, dated December 21, 1994, is unreported and is reproduced in Appendix B (3a-4a). The final order of the District Court Granting Summary Judgment, dated November 16, 1994, is unreported and reproduced in Appendix C (5a-14a).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on August 23, 1995. In response to a timely Application for Extension of Time to File Petition for Writ of Certiorari, this Court gave Petitioner, Lewis J. Mertz, until December 22, 1995, to file this Petition for Writ of Certiorari. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, section 1, provides in relevant part as follows:

[N]or shall any State deprive any person of life,

liberty, or property, without due process of law.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner, Lewis J. Mertz ("Mertz") was the Major of the respondent, City of Key West, Florida's Police Department from October 18, 1989 until he was terminated, effective October 1, 1991. (R1-8-1, ¶2)[1]/. Mertz first became aware that the City of Key West, Florida (the "City") had an opening for the position of Major when he read an advertisement in Police Chief Magazine, published by the International Association of Police Chiefs. (R1-8-1, ¶3). Mertz applied for the position with the City and spoke about the position on several occasions by telephone with then-Police Chief Thomas Webster ("Chief Webster") during the summer of 1989. (R1-8-1, ¶2; R1-8-2, ¶3; R1-14-21-22).

During these conversations, Mertz was advised by Chief Webster that, if hired by the City, Mertz would be a regular employee and that, upon successfully passing his probationary period, he would receive civil service protection. (R1-8-2, ¶3). The City Commission of the City of Key West authorized the City Manager to direct Chief Webster to offer Mertz the position of Major. (R1-8-2, ¶4 Exh. A). The letter from Chief Webster, dated September

---

[1] Citations are to the district court record, as certified to the Eleventh Circuit.

5, 1989, provided that Mertz would

> be allowed all benefits and rights afforded to any certified police officer, other than the Police Chief, as provided by the City of Key West and the State of Florida and will be subject to the applicable employee rules.

(R1-8-2, Exh. A).

In a letter dated September 14, 1989, Mertz accepted the position of Major and began to work for the City on October 18, 1989. (R1-8-1, ¶5 & Exh. B). At the time Mertz accepted employment with the City, he expected to receive the same benefits and rights of any other certified police officer, including civil service status. (R1-8-1, ¶6). Based on his pre-employment discussions with Chief Webster, Mertz believed that he would gain permanent status and civil service protection once he had completed a one-year probationary period. (R1-8-1, ¶7). At the time Mertz was hired and at all times throughout his employment with the City, all certified police officers other than the Chief of Police were protected under the City's Civil Service System. (R1-8-3).

Throughout his employment by the City, Mertz performed his job responsibilities in an exemplary manner. (R1-8-2, ¶9). On or about October 14, 1990, Chief Webster prepared a "Civil Service Board Work Performance Evaluation" of Mertz and stated that he had "successfully completed his probationary period." (R1-8-2, ¶9). Both

Chief Webster and Mertz believed that, once he passed his probationary period, Mertz became a permanent employee, entitled to the rights afforded City employees under the City's Civil Service Rules and Regulations (R1-8-1, ¶7; R1-8-2, ¶¶5, 10).

In July of 1991, the City Manager, George Felix Cooper (the "City Manager") submitted a budget proposal to the City Commission which included the elimination of the position of Major in the Police Department. (R1-8-8a, #7). On August 29, 1991, the City Manager wrote a letter to Mertz, informing him that his position was being abolished and that the City had decided to terminate his employment effective October 1, 1991. (R1-15-Exh. 8). On September 17, 1991, Mertz responded to the City Manger's August 29, 1991 letter and stated that "pursuant to both verbal and written agreements with City recruiters regarding [his] employment position [it was] not terminable at will" and that he was "entitled to appeal to the Civil Service Board." (R1-8-1, ¶12 & Exh. I).

On September 18, 1991, Mertz wrote to the City's Civil Service Board (the "Board") and stated that when he began his employment with the city it was represented to him that his position would be a permanent position governed by City rules and regulations, including the civil service rules. (R1-8-1, ¶13 & Exh. J). Mertz further stated that he sought to exercise his "right of appeal to the Civil Service Board and to demonstrate that the action of the City Manager ha[d] been taken out of personal malice, without just cause, and denie[d] [him] due process of both City

policy and the law in depriving [him] of employment." (R1-8-1, ¶13 & Exh. J).

On September 26, 1991, Mertz again wrote to the City Manger asking if there were any additional procedures necessary to protect his employment other than the appeal he had already filed with the Civil Service Board. (R1-8-1, ¶14 & Exh. K). On September 26, 1991, Mertz wrote again to the Board requesting advice as to any additional measures he had to follow to perfect his grievance with the City to the Board. (R1-8-1, ¶16 & Exh. M). In response, on September 27, 1991, Assistant City Manager Ron Herron wrote to Mertz that the City's Personnel Policy regarding reduction in work force was the only administrative rule that he was "aware of other than the Civil Service appeal [Mertz had] already filed that dealt with [his] situation." (R1-8-1, ¶15 & Exh. L).

Mertz was terminated from his position effective October 1, 1991. (R1-8-1, ¶17 & Exhs. N, O). On October 8, 1991, having received no response from the Board, Mertz again wrote to the Board and the City Manager advising them of his decision to appeal his termination and inquiring whether any additional action must be taken to ensure that his grievance would be heard by the Board. (R1-8-1, ¶18 & Exhs. P, Q). In a letter dated October 28, 1991, Mertz was advised that the Board had considered his request for a hearing as an item on the Board's agenda at its meeting on October 23, 1991, and that the Board had determined that it had no jurisdiction to hear his grievance. (R1-8-1, ¶22 & Exh. T).

Having received no notice that his grievance was on the agenda of the Civil Service Board, Mertz was not informed that the Board was going to consider his grievance and request for hearing at its October 23, 1991 meeting. The Board did not give Mertz an opportunity to present any evidence or witnesses to the Board or to demonstrate that he was a protected Civil Service Employee. (R1-31-App. A, ¶8). At no time did the City or the Board hold a hearing prior to terminating Mertz, to provide him an opportunity to establish whether he was a civil service protected employee. The City never provided Mertz with the opportunity available to civil service employees to bump other employees, to transfer into a vacant position, to be placed on a preferred list, or to be recalled when a position became available; nor did the City allow Mertz the right to grieve the City's failure to provide him the benefits and rights he should have been afforded as a Civil Service employee.

B. Disposition in the Courts Below

On October 8, 1993, Mertz filed the instant action in the United States District Court for the Southern District of Florida, under 42 U.S.C. §1983, asserting that he had been terminated by the City from his position of Police Major in violation of his rights to procedural due process, basing jurisdiction on 28 U.S.C. § 1331. Mertz claimed that he was terminated without just cause or reason, for false, arbitrary and unreasonable grounds, and that he was denied the right to grieve or appeal the termination decision to the City of Key West Civil Service Board. Furthermore, Mertz alleged he was not allowed to transfer into vacant positions,

to bump persons lower in rank, to be placed on a preferred list, or to be recalled when a position became available. (R1-1).

On September 16, 1994, Mertz filed a Motion, Memorandum, and supporting documentation for partial summary judgment arguing that he had a property interest in continued employment with the City and that the City discharged him without procedural due process by failing to provide him with the rights provided to civil service employees of the City, including: (i) the right to a hearing prior to being terminated; (ii) the right to bump other employees; (iii) the right to transfer into a vacant position; (iv) the right to be placed on the preferred list; (v) the right to be recalled when a position became available; and (vi) the right to grieve the City's failure to provide him the benefits and rights of a public service employee. (R1-7; R1-35).

On September 21, 1994, the City filed a Motion, Memorandum, and supporting documentation for summary judgment. (R1-16). The City argued that it was entitled to summary judgment to the extent that Mertz sought to base his claim on substantive due process, because that claim was eliminated by the Eleventh Circuit's decision in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. den., __ U.S. __, 115 S.Ct. 898 (1995). (R1-16-7). The City also argued that Mertz's procedural due process claim was barred by McKinney, because Mertz was entitled to challenge his termination and the Board's decision by certiorari review in Florida's circuit court; which he failed to utilize. (R1-16-8).

On November 16, 1994, the District Court entered a Final Order granting summary judgment in favor of the City. App. 5a-14a. Relying on McKinney, the District Court ruled that Mertz's claim that he had "a property interest in his job, that the City deprived him of this interest when it terminated his employment, and the City's elimination of [Mertz's] position for budgetary reasons was a sham" raised a substantive due process claim which was no longer viable. App. 10a-11a. As to Mertz's procedural due process claim, the District Court, again relying on McKinney, ruled that Mertz could not state a claim for denial of procedural due process in connection with his termination of employment. App. 11a-13a. The Court reasoned that "[a] due process violation is not complete 'unless and until the State fails to provide due process'" and that "'only when the State refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under §1983 arise.'" App. 11a (citations omitted). Applying that reasoning, the District Court concluded that, under Florida law, the state process provided an available procedure for Mertz to remedy the alleged procedural violation. App. 12a. First, the District Court concluded that "Plaintiff had the right to challenge both his termination and the Board's refusal to hear his grievance by writ of certiorari to the Florida Circuit Court." App. 12a. Furthermore, the District Court reasoned that "Plaintiff also could have sought a writ of mandamus to compel the Board to conduct the hearing." App. 12a.

The District Court concluded that, under the McKinney analysis, Mertz could not state either a

substantive or a procedural due process claim under 42 U.S.C. §1983. App. 13a. The District Court further stated that its jurisdiction "did not reach the issue of whether Plaintiff had a property right of continued employment, as this is a substantive determination this Court cannot make." App. 13a.

On appeal, a panel of the Eleventh Circuit affirmed, per curiam, the District Court's grant of summary judgment in favor of the City and against Mertz. The Court found that

> [p]ursuant to our recent decision in McKinney v. Pate,...we agree with the district court that Mertz cannot bring a claim for violation of his substantive due process rights in federal court. Moreover, we agree with the district court that Mertz's claim for a violation of his procedural due process rights also may not be brought in federal court because the state of Florida affords Mertz adequate remedies for alleged procedural due process violations....

App. 2a.

REASONS FOR GRANTING THE WRIT

This Petition for a Writ of Certiorari challenges the position taken by the Eleventh Circuit with regard to the application of the Due Process Clause of the Fourteenth Amendment to the termination of a public employee who has a state-created property interest in continued employment,

and who has received absolutely no pre-termination due process. Specifically, this Petition challenges the Eleventh Circuit's position that an employee who has a property interest in continued employment, and who is terminated without prior notice and an opportunity to be heard, cannot assert a federal §1983 procedural due process claim unless and until he avails himself of any and all state court remedies.[2] We demonstrate below why the challenged position raises an important question of federal law, conflicts with the law of this Court and the law of other Circuits, and therefore, warrants review by this Court.

The Eleventh Circuit, relying on its reasoning in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), cert. den., __ U.S. __, 115 S.Ct. 898 (1995), held that Mertz could not bring a claim for a violation of his procedural due process rights "because the state of Florida affords Mertz adequate remedies for alleged procedural due process violations." App. 2a. In so holding, neither the Eleventh Circuit, nor the District Court examined whether Mertz received any pre-termination due process whatsoever. Implicit in the Eleventh Circuit's holding is the rationale that, even if Mertz received absolutely no pre-termination due process, as opposed to flawed or inadequate pre-termination due process, he is precluded from asserting a Section 1983 claim, because he did not avail himself of post-termination state law remedies. Such rationale conflicts directly with the law of this Court.

---

[2] Mertz is not challenging the Eleventh Circuit's ruling on the substantive due process issue.

As announced by the Eleventh Circuit in McKinney, and applied in this case, an employee who has been denied pre-termination due process cannot bring his/her claim in federal court until he/she has pursued all available post-deprivation state court remedies. McKinney, 20 F.3d at 1563. As the Eleventh Circuit stated

> The precedent established by Parratt is unambiguous: even if McKinney suffered a procedural deprivation at the hands of a biased Board at his termination hearing, he has not suffered a violation of his procedural due process rights unless and until the State of Florida refuses to make available a means to remedy the deprivation. As any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners, under Parratt, only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation.

McKinney, 20 F.3d at 1563. As applied in this case, this is true even if the employee received neither notice, or an opportunity to be heard, prior to termination. Such a holding effectively wipes out a long line of Eleventh Circuit precedent to the contrary, and directly conflicts with the law established by this Court.

This Court and the Circuit Courts have repeatedly held that an aggrieved employee who has been denied his

property right to continued employment, must be provided, at the very least, with notice and an opportunity to be heard prior to termination. See e.g. Patsy v. Board of Regents, 457 U.S. 496 (1982); Cotnoir v. Univ. of Maine Systems, 35 F.3d 6, 11 (1st Cir. 1994)(employer must provide employee with notice and opportunity to be heard prior to termination); Fetner v. City of Roanoke, 813 F.2d 1183, 1186 (11th Cir. 1987)("due process has been consistently held to require pre-deprivation notice and a hearing"); Schultz v. Baumgart, 738 F.2d 231, 235 (7th Cir. 1984)(due process requires, at a minimum, "prior notice..., and a meaningful opportunity to respond prior to termination"). As this Court stated in Patsy, "[i]f he was terminated without those protections, the constitutional deprivation was then complete [and he] need not have exhausted other state remedies before bringing his §1983 claim." Patsy, 457 U.S. at 516. This Court's precedent is directly contradicted by the Eleventh Circuit's holding in McKinney, and its application in this case. The Eleventh Circuit has established a rule that, even in the absence of any pre-termination due process, an aggrieved employee is barred from pursuing a §1983 claim in federal court unless and until he/she has availed himself/herself of any and all potential state court remedies. The conclusion that Mertz has not stated a procedural due process claim under the circumstances of his termination improperly embraces an exhaustion of administrative remedies requirement for Section 1983, prohibited by this Court in Patsy, and obliterates Section 1983 procedural due process claims by terminated civil service employees in the federal courts in the Eleventh Circuit.

Between July of 1991, when the City Manager first proposed eliminating Mertz's position, and October 1, 1991, the date of his termination, the City had an abundance of time to provide Mertz with the requisite pre-deprivation due process. Because the City had ample opportunity to provide Mertz with notice and a hearing, and yet he received absolutely no pre-termination due process, as opposed to inadequate or flawed pre-termination due process, this Court's precedent dictates that his Section 1983 procedural due process claim is not barred.

This Court has repeatedly recognized that the complete lack of any pre-termination due process, as opposed to a flawed pre-termination process, cannot be remedied by post-deprivation remedies, even if these remedies are, in some sense, "adequate." Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985). Furthermore, the Eleventh Circuit, in numerous pre-McKinney cases recognized that, regardless of the availability of state post-deprivation remedies, a plaintiff has asserted a viable §1983 procedural due process claim, if he/she has been completely denied pre-termination due process. See e.g. Fetner, 813 F.2d at 1186. This procedural pre-termination protection requires, at a minimum, notice of the charges, an explanation of the employer's evidence, and an opportunity to present a case. Id. See also Loudermill, 470 U.S. at 546. In the absence of such procedural pre-termination protection, post-termination remedies, no matter how "adequate," cannot remedy the due process violation. Loudermill, 470 U.S. at 546. An individual denied this most minimal of pre-termination process is not required to

exhaust state and/or administrative remedies before pursuing a §1983 procedural due process claim in federal court. Patsy, 457 U.S. at 516. See also Chaney v. Suburban Bus Div. of Regional Transp. Authority, 52 F.3d 623, 629 (7th Cir. 1995) ("due process requires pre-termination notice and an opportunity to respond even where a CBA provides for post-termination procedures that fully compensate wrongfully terminated employees"), citing Loudermill, 470 U.S. at 535-536, 542-546.

The Eleventh Circuit adopted a rule in McKinney, as applied in this case, which directly contravenes this Court's longstanding requirement that an employee with a property right in continued employment must be afforded, at the very least, notice and an opportunity to be heard prior to termination. According to the Eleventh Circuit, an employee who has been denied even these most minimal of pre-termination protections is precluded from seeking redress in federal court until he/she has exhausted all available state court remedies. Certiorari review by this Court is warranted to address the Eleventh Circuit's complete disregard of Supreme Court precedent regarding the viability of federal procedural due process claims of terminated public employees who have received absolutely no pre-deprivation due process.

In holding that Mertz was required to exhaust his state remedies before pursuing his federal claim, the Eleventh Circuit also mis-applied this Court's precedent, annunciated in Parratt v. Taylor, 451 U.S. 527 (1981), and clarified in Zinermon v. Burch, 494 U.S. 113 (1990). In

Parratt, this Court held that the availability of a constitutionally adequate postdeprivation remedy in state court satisfies the demands of procedural due process where the deprivation complained of was caused by "random and unauthorized" conduct. Parratt, 451 U.S. at 541. In Zinermon, this Court recognized a conflict among the circuits regarding the applicability of Parratt in cases where "defendant state officials had the state-clothed authority to effect a deprivation and had the power to provide the plaintiff with a hearing before they did so." Zinermon, 494 U.S. at 135-139. In an attempt to resolve the conflict, this Court held that the term "random and unauthorized" conduct, as used in Parratt, does not apply in situations where the state actor, who has "the power and authority to effect the deprivation complained of," also has the power and the duty to provide pre-deprivation due process. Zinermon, 494 U.S. at 135-139. Therefore, this Court held that, "[i]n situations where the State feasibly can provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post deprivation tort remedy to compensate for the taking." Zinermon, 494 U.S. at 132.

In direct contravention of this Court's precedent, the Eleventh Circuit, in McKinney announced a rule, applied in this case, that the Parratt exception to pre-deprivation due process now applies even in situations where the employer who has the power and the authority to terminate the employee, also has the power and duty to provide the requisite pre-deprivation due process. As the Eleventh Circuit stated:

> [t]he precedent established by Parratt is unambiguous....[a]s any bias on the part of the Board was not sanctioned by the State and was the product of the intentional acts of the commissioners, under Parratt, only the state's refusal to provide a means to correct any error resulting from the bias would engender a procedural due process violation.

McKinney, 20 F.3d at 1563.

In applying McKinney to this case, and holding that Mertz did not have a viable §1983 procedural due process claim, because he did not avail himself of potential post-deprivation remedies, the Eleventh Circuit mis-applied Parratt, and seemingly confused this case with one where it would have been impractical or impossible to provide any pre-termination process. It is only under such circumstances that an individual is required to exhaust his/her state remedies before pursuing a §1983 procedural due process claim in federal court. See e.g., Zinermon v. Burch, 494 U.S. 113, 132 (1990); Loudermill, 470 U.S.at 542; Parratt v. Taylor, 451 U.S. 527 (1981). In sharp contrast, the City had ample opportunity, and in fact a procedure in place, to provide Mertz with the requisite pre-termination due process. Yet, the City failed to do so. Pursuant to this Court's binding precedent, where a governmental employer had ample time to provide the aggrieved employee with notice and an opportunity to be heard prior to termination, and failed to do so, the procedural due process violation is complete and the availability of state administrative and/or

judicial remedies is irrelevant. See e.g., Zinermon, 494 U.S. at 132.

In this case, because Mertz received absolutely no pre-termination due process, he immediately had a cognizable §1983 procedural due process claim and the availability of purportedly adequate post-deprivation state remedies was irrelevant.

In Loudermill, discussed above, this Court ruled that a valid §1983 procedural due process claim can be stated where the employer had failed to provide some kind of pre-termination hearing, despite the availability of adequate post-termination procedures. 470 U.S. at 546. The instant situation is analogous to that envisioned in Loudermill. Even assuming the existence and adequacy of post-termination state law remedies of writ of certiorari or writ of mandamus, the City failed to provide Mertz with any type of pre-termination hearing. Therefore, Mertz has stated a constitutionally valid §1983 claim and has appropriately brought this claim in federal court. See Fetner, 813 F.2d at 1184 ("Congress further indicated that an important aspect of [Section 1983] was that federal courts directly supervise the enforcement of these federal remedies, regardless of the existence of state courts and comparable state law remedies."). This Court's precedent teaches that once the constitutional harm has been done "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the rights of procedural due process has already occurred." Fuentes v. Shevin, 407 U.S. 67, 82 (1972). As this Court has stated, prior to adverse job action,

a public employee with a property interest in continued employment "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Loudermill, 470 U.S. at 546.

Accordingly, circuit courts which have interpreted and applied this Court's precedent, have repeatedly held that the availability of post-deprivation state court remedies cannot cure the failure to provide at least minimal pre-termination due process. See e.g. Chaney, 52 F.3d at 629 (availability of post-deprivation remedies is irrelevant if employee was received no pre-termination notice or opportunity to be heard); Cotnoir Systems v. Univ. of Maine, 35 F.3d 6, 11-13 (1st Cir. 1994)(if employee is fired without notice, explanation of employer's evidence and an opportunity to present his side of the story, "normally the constitutional deprivation is complete," and post-deprivation remedies are irrelevant). As the Seventh Circuit stated in Schultz v. Baumgart,

> if Schultz was indeed fired in violation of his due process rights, the availability of post-deprivation grievance procedures or a board hearing would not have cured the violation. Schultz was entitled to notice and a meaningful opportunity to respond before he was terminated. If he was terminated without those protections, the constitutional deprivation was then complete. Schultz need not have exhausted other state remedies before bringing his section 1983 claim.

Schultz v. Baumgart, 738 F.2d at 237, citing Patsy, 457 U.S. at 516.

The Eleventh Circuit has adopted a rule in McKinney, as applied to Mertz, which runs afoul of this Court's precedent regarding the viability of a §1983 procedural due process claim, in a situation where an employee was denied even the most minimal of pre-deprivation process. A grant of certiorari is warranted in the instant case to address the Eleventh Circuit's position.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

DAVID M. LIPMAN
(Counsel of Record)
DAVID M. LIPMAN, P.A.
5901 S.w. 74th Street
Suite #304
Miami, Florida 33143
(305) 662-2600

ROBERT E. WEISBERG
KAREN D. TURNER
LAW OFFICES OF ROBERT E. WEISBERG
1450 Madruga Avenue
Suite #209
Coral Gables, FL 33146
(305) 666-6095

APPENDIX

APPENDIX A

[Filed August 23, 1995]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5268

(D. C. Docket No. 93-10072-CIV-JLK)

LEWIS J. MERTZ,
Plaintiff-Appellant,

versus

CITY OF KEY WEST, FLORIDA,
Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

(August 23, 1995)

Before BIRCH, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Appellant Lewis J. Mertz ("Mertz") appeals from the district court's grant of summary judgment in favor of appellee, City of Key West, Florida ("the City").

Pursuant to our recent decision in McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994) (en banc), we agree with the district court that Mertz cannot bring a claim for violation of his substantive due process rights in federal court. Moreover, we agree with the district court that Mertz's claim for a violation of his procedural due process rights also may not be brought in federal court because the state of Florida affords Mertz adequate remedies for alleged procedural due process violations. For these reasons, we affirm the district court's grant of summary judgment in favor of the City and against Mertz.

AFFIRMED.

APPENDIX B

[Filed December 21, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(CASE NO.: 93-10072-CIV-KING)

LEWIS J. MERTZ,
Plaintiff,

vs.

CITY OF KEY WEST, FLORIDA,
Defendant.

SUMMARY FINAL JUDGMENT

(December 21, 1994)

For the reasons stated in the Court's Final Order granting Defendant's Motion for Summary Judgment, it is

ORDERED AND ADJUDGED Summary Final Judgment be and the same is hereby ENTERED in favor of Defendant, City of Key West, Florida, and against Plaintiff, Lewis J. Mertz. Accordingly, it is further

ORDERED AND ADJUDGED that Plaintiff LEWIS J. MERTZ shall take nothing by this action from Defendant CITY OF KEY WEST, FLORIDA, and that Defendant CITY OF KEY WEST, FLORIDA shall go hence without day.

DONE AND ORDERED in Chambers, at Miami, Dade County, Florida, this 21 day of December, 1994.

/s/ James Lawrence King
JAMES LAWRENCE KING
United States District Judge
Southern District of Florida

cc: Robert E. Weisberg, Esq.
Edward S. Polk, Esq.

APPENDIX C

[Filed November 16, 1994]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

(CASE NO.: 93-10072-CIV-KING)

LEWIS J. MERTZ,
Plaintiff,

vs.

CITY OF KEY WEST, FLORIDA,
Defendant.

FINAL ORDER GRANTING SUMMARY JUDGMENT

(November 16, 1994)

This cause is before the court upon cross motions for summary judgment pursuant to Fed.R.Civ.P.56(c).

Lewis J. Mertz was employed October 18, 1989 as a Major in the City of Key West Police Department.[1] He served in that position until October 1, 1991, when the position was eliminated. Plaintiff alleges this action by the City of Key West violated his constitutional rights secured by the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States. Plaintiff seeks damages, a declaratory judgment, and injunctive relief, pursuant to 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

The City denies all allegations of discrimination or other improper conduct and asserts that the position of Police Major was eliminated as part of the budgetary process for the 1991/1992 fiscal year.

I. FACTUAL BACKGROUND

In preparing the annual budget, the City Manager, in July, 1991, submitted to the City Commission proposals for budget reduction measures that included the elimination of the Police Major position. After conducting workshops on the budget, the City Manager informed Plaintiff, on August 29, 1991, that it had determined Plaintiff to be a contract

---

[1]Prior to this date, the City did not have a position of Police Major.

employee whose position was to be eliminated as part of the budget process at a public hearing to be held on September 17, 1991.[2]

Plaintiff immediately wrote to the City Manager protesting the termination decision and contesting the characterization of his employment as contractual. During September, 1989, Plaintiff wrote to the Civil Service Board to state his desire to appeal the termination and to request information on how to file a grievance.[3] This request for a hearing was denied on the basis the Board lacked jurisdiction over contract employees.

The City terminated Plaintiff from his position as Police Major pursuant to the decision reached at the September 17, 1991 public hearing. The official reason for the termination was the abolition of the Police Major position. Plaintiff subsequently filed suit in this Court under the Fourteenth Amendment and 42 U.S.C. § 1983.

---

[2] The letter informing the Plaintiff of this action also noted that "[a]lthough there is always the possibility that public input may cause the Commission to leave the position of Major in the budget, there is equal, if not greater, possibility that this will not happen." App.1, Mertz Aff., Exh. G.

[3] Plaintiff Mertz' Affidavit contains a more detailed listing of Plaintiff's correspondence with the City and other administrative bodies.

II. LEGAL STANDARD

Summary judgment is appropriate only where it is shown that no genuine dispute as to any material fact exists and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; Matsushita Elec. Industrial Co. v. Zenith Radio Corp., 475 U.S. 574 (1986). In ruling on the moving party's motion, the court must view the evidence in the light most favorable to the non-moving party. Celotex Corp. v. Catrett, 477 U.S. 317 (1986). In so doing, the court "should 'resolve all reasonable doubts about the facts in favor of the non-movant' and draw 'all justifiable inferences ... in his favor.'" United States v. Four Parcels of Real Property, 941 F.2d 1428, 1437 (11th Cir. 1991) (alteration in original) (citation omitted).

Initially, the moving party bears the burden of pointing to that part of the record which shows the absence of a genuine issue of material fact. If the movant meets its burden, the burden then shifts to the non-moving party to establish that a genuine dispute of material fact exists. Hairston v. Gainesville Sun Pub. Co., 9 F.3d 913, 918 (11th Cir. 1993), reh'g denied, 16 F.3d 1233 (11th Cir. 1994). To meet this burden, the non-moving party must go beyond the pleadings. If the evidence relied on is such that a reasonable jury could return a verdict in favor of the non-moving party, then the Court should refuse to grant summary judgment. Id. However, a mere scintilla of evidence in support of the non-moving party's position is

insufficient to defeat a motion for summary judgment. Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986).

III. Analysis

The facts as articulated above are not in dispute. The Court thus finds that there are no disputed issues of material fact that would preclude summary judgment. The issues in dispute are legal in nature and thus are appropriate for summary disposition. Specifically, the issue is whether Plaintiff may assert in federal court a claim for violation of his due process rights from the termination of his employment as Police Major.

A. Substantive Due Process

In his Motion for Partial Summary Judgment, Plaintiff contends that he has a property interest in his employment and that the City violated this interest when it abolished his position for budgetary reasons, which Plaintiff asserts are pretextual. Defendant argues that Plaintiff's claim is a substantive due process claim and is thus precluded under McKinney v. Pate, 20 F.3d 1550 (11th Cir. 1994).

In McKinney v. Pate, the Eleventh Circuit, en banc, reversed a decade of precedent when it held that "in non-legislative cases, only procedural due process claims are available to pretextually terminated employees." McKinney v. Pate, 20 F.3d 1550, 1560 (11th Cir. 1994). A public

employee thus cannot raise substantive due process claims for pretextual termination under 42 U.S.C. § 1983 in federal court. Substantive due process rights "are created only by the Constitution." Regents of Univ. of Michigan v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J. concurring).

State law creates employment rights and thus they are not "fundamental" rights created by the Constitution. Where state law creates such substantive rights, they are not subject to due process protection under the Due Process Clause of the Fourteenth Amendment. Id. at 1556. The Eleventh Circuit concludes that "these state law based rights constitutionally may be rescinded as long as the elements of procedural -- not substantive -- due process are observed." McKinney, 20 F3d at 1556.

Prior to McKinney, a substantive due process violation would occur "when an employer deprives the employee of a 'property interest for an improper motive and by means that [are] pretextual, arbitrary, capricious,' regardless of whether or not a hearing was held." Nolin v. Douglas County, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (alteration in original) (citation omitted). Plaintiff in the instant case claims that he has a property interest in his job, that the City deprived him of this interest when it terminated his employment, and that the City's elimination of Plaintiff's position for budgetary reasons was a sham.

This Court finds that Plaintiff asserts a substantive due process claim. As McKinney makes clear, pretextually terminated public employees may bring only procedural due process claims in federal court. This Court is thus an inappropriate forum for Plaintiff's claim of pretextual termination.

B. Procedural Due Process

The Court now turns to Plaintiff's procedural due process claim. Plaintiff argues that the Civil Service Board's refusal to grant him a hearing constitutes denial of his due process rights. Defendant contends that the state provided a means to remedy the alleged procedural deprivation and that Plaintiff's failure to utilize available state procedures does not constitute a deprivation of due process.

Plaintiff's argument is without merit. A due process violation is not complete "unless and until the State fails to provide due process." Zinermon v. Burch, 494 U.S. 113, 126 (1990). The Eleventh Circuit also states that "only when the state refuses to provide a process sufficient to remedy the procedural deprivation does a constitutional violation actionable under section 1983 arise." McKinney, 20 F.3d at 1556. Plaintiff argues only that the State remedies of writs of certiorari and mandamus were not appropriate in this case, but does not allege that these procedures are inadequate.

Examination of the state process reveals that Plaintiff had an available procedure to remedy the alleged procedural violation. Under Florida law, a party may petition for certiorari to the circuit court for review of an administrative agency decision that is not governed by the Administrative Procedure Act. Ceslow v. Board of County Comm'rs, 428 So.2d 701 (Fla. Dist.Ct.App. 1983). On certiorari review, the circuit court's powers are broad:

> Where a party is entitled as a matter of right to seek review in the circuit court ..., the circuit court must determine whether procedural due process is accorded ... and whether the administrative findings and judgment are supported by competent substantial evidence.

City of Deerfield Beach v. Vaillant, 419 So.2d 624, 626 (Fla. 1982). The Florida circuit courts thus review the case and consider it fully to determine whether there was due process.

For due process purposes, the state is obligated only to make available "the means by which [the employee] can receive redress for the deprivations." Parrat v. Taylor, 451 U.S. 527, 543 (1981) (footnote omitted). Clearly, Plaintiff had the right to challenge both his termination and the Board's refusal to hear his grievance by writ of certiorari to the Florida circuit court. Plaintiff also could have sought a writ of mandamus to compel the Board to conduct the

hearing. See e.g., City of Tarpon Springs v. State ex. rel. Meister, 392 So.2d 1345 (Fla. Dist.Ct.App. 1981) ("Inasmuch as mandamus is a remedy to command performance of a ministerial right and conducting the hearing was a ministerial function under the City's ordinances, the writ [of mandamus] ... compelling the City to conduct the hearing was appropriate.").

IV. Conclusion

Thus, under the McKinney analysis, this Court finds that Plaintiff cannot and has not stated a substantive or procedural due process claim under 42 U.S.C. § 1983. This Court specifically does not reach the issue of whether Plaintiff had a property right in continued employment, as this is a substantive determination this Court cannot make.

Accordingly, after a careful review of the record, and for the reasons stated herein, and the Court being otherwise fully advised, it is therefore

ORDERED and ADJUDGED that Final Summary Judgment in favor of the Defendant, City of Key West be, and the same is hereby, GRANTED.

DONE and ORDERED in chambers at the United States District Courthouse, Federal Justice Building, Miami, Florida, this 16th day of November, 1994.

/s/ James Lawrence King
JAMES LAWRENCE KING
U.S. District Judge
Southern District of Florida

cc: Edward S. Polk, Esq.
Robert E. Weisberg, Esq.